No. 6792

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

13

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALEXANDER STUMPF, J. L. COATES, OLIE OLSON, THEODORE BRIX, ZONE KIRKORIAN, D. ARKALIAN, JAMES PROCTOR and EUGENE L. KENNEY,
Defendants.

J. L. COATES,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

MOTION FOR REHEARING

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The defendant, J. L. Coates, in the above action does hereby move this Honorable Court for an order

directing and granting reargument on the several counts as in the indictment in this case set forth, and on each of them, and on the matters and proceedings as contained in the record in this case materially affecting the constitutional rights of this defendant, to-wit:

This motion raises three main points:

(a) The purpose and effort of defendant was the promotion of his vineyard industry and not with any purpose or act of illicit distillery.

(b) The apparent assumption on all sides was confession of guilt by defendant.

(c) The sentence is not justified by the facts and circumstances.

I.

The severity of the sentence, to-wit, one year and one day in Federal penitentiary McNeil's Island, imposed on the defendant in this case, or indeed any sentence of imprisonment was, it is believed, wholly unjustified by all the facts and circumstances developed during the trial in the District Court, and is abuse of judicial discretion.

II.

It will be noted that the indictment in this case was found and presented long after the plant had been dismantled and after these defendants had severed all

connection with Stumpf, or with the plant. Stumpf's conspiracy was therefore ended.

The record in this case is believed to be consistent with the innocence of these defendants, although the opinion rendered by this Honorable Court proceeds upon the view that it was admitted on behalf of the appellant that he was a party to the conspiracy. In that connection, we call to the Court's attention that the mention of two conspiracies and naming of parties thereto, was not in any sense an admission of guilt, but was a statement by counsel of their analysis of the organization of conspiracy, and the employment of the terms used by counsel was the sole and only basis for any construction of admission by defendant of connection with Stumpf as conspirators. This Court will see, therefore, the great injustice and injury done to this defendant by such a construction being carried throughout the entire case. Nowhere in the case does it appear that defendants admitted any guilt whatever. On the contrary they proceeded to trial on the theory that they were not guilty, for had such admission been made in the case, the trial would have been an absurdity, and these defendants should not be charged or held responsible for a misconception, either through their counsel or otherwise, and we pray this Court for relief through rehearing and a new trial.

III.

The Act of Congress requires the possessor of a still to secure a permit for its use. Witness Stumpf tes-

tifies that the still, so-called in this case, was a patched up job affair (see Whitfield, page 148); Witness Olson, also testifies that the still, as arranged there, would not work in that way (page 108).

Obeying the Act of Congress, there was a choice between securing permit, and dismantling the plant and destroying the still. The latter course was chosen and the plant entirely dismantled. *Non constat* that had this defendant, or Stumpf, or anyone chosen to operate the still, that he would not have secured the permit as required by the Act of Congress, for which he had abundant time and opportunity so to do, and this Court, we submit, will now construe that situation favorably to this defendant. It is said that a small quantity of alcohol was secured from the still in a mayonaise bottle, but as to that, can we believe Stumpf who admittedly was playing a most deceitful game of fraud against Coates, or may he not have procured the alcohol elsewhere?

The dismantling of the plant was brought about by Coates demanding from Stumpf an accounting and return of the money he, Coates, had loaned to Stumpf, as we contend, and upon opportunity expect to prove.

IV.

The record justifies the conclusion that Stumpf had no intention whatever of engaging in illicit distilling of alcohol and that no one in this case ever engaged in the manufacture or distilling of liquor, and as the right and time then both existed for obtaining a

license or permit, it would seem to us that the action of the Government in securing the indictment was unnecessary in light of the fact that the plant had never operated and had been dismantled.

V.

That Stumpf never meant to engage in such trade, and did not so engage, but did abandon his scheme and the still at the point when he discovered he could borrow no more money from Coates, who should not now be charged with all the Stumpf rascality.

THE FUNDAMENTAL

It is fundamental in law, as well as business sense, that, in any enterprise, minds must meet. An analysis of this instant case shows Alexander Stumpf standing alone on the one side, promoting a fraudulent scheme of deceit and false pretense, and on the other side six victims including the two defendants, Coates and Arkalian, and Brix; Coates' connection with Stumpf was in aid of his grape concentrate business; Arkalian was a neutral figure but in contact with certain circumstances, while Brix was admittedly in conspiracy with Stumpf and Malter, yet notwithstanding that he was a victim of Stumpf, so that in case of either or all of them, the minds did not meet on the common ground with Stumpf, and therefore no conspiracy involving the infraction of the United States statute under which they were indicted, and no guilt could be charged to them.

Stumpf alone had any knowledge of stills or their operation, and as appears from the testimony, Stumpf had no purpose to operate a still, and in the absence of such purpose these defendants could not be guilty.

VI.

As showing Coates' condition of mind and business purpose with reference to the Stumpf proposition, the testimony of Coates Junior (page 175) shows that the purpose of this defendant in talking with Stumpf at all, was to promote the concentrate industry in which he, the defendant, was largely interested.

The witness Cain, familiar with grape concentrate business, also explains about Coates and his grape concentrate business, and that he never heard Coates say anything about manufacturing alcohol, and that a still is necessary in manufacture of grape concentrate.

The witness Ferdinand Andreas also refers to the intention of Coates to put up a concentrate syrup plant.

Likewise, the prejudiced witness Malter testifies that the grape concentrate deal was mentioned to him by Coates (page 167).

Also, the testimony of Nichols (page 174) referring to conversation with different of the parties says, "All the conversation was about concentrates."

The witness Coates testifies (pages 176-177) that he got from Whitfield, a Government witness, that he, Whitfield, believed that Coates started in a grape concentrate syrup deal in the beginning.

Edna Pearl Coates testifies that the defendant, Coates, told his father and the witness that he had gone into the grape concentrate syrup.

Also, W. G. Phillips, a witness, testifies he heard a conversation between Coates and Malter with reference to a grape syrup business—"a proposition for entering into the manufacture of grape syrup was the topic of discussion between the gentlemen besides myself. Malter explained how grape syrup was manufactured."

To the same effect was the testimony of Francis Morin (page 184): "In conversation with Malter he told me that he and Coates were in the syrup business."

In the consideration of the case, the testimony of all those witnesses established for Coates the purpose of his going into the business at all was the grape concentrate or syrup business and not in illicit manufacture of alcohol. In addition to all the above is the testimony of Stumpf himself (page 66) at the time he mentioned the proposition to Coates that "Coates said: 'well, if it's the right thing, why I will be glad to come in,'" and no other construction should be given against the interest of this defendant than that he meant the grape industry.

Further, Coates Junior testifies (page 176) that Malter absolutely assured him that through the hard efforts of Henry Barbour, Congressman, he had, or

would acquire, a proper and legal permit to make grape concentrates.

In the face of all that testimony as to the purpose of Coates advancing money to Stumpf, is it not clear that Coates did not have a fair, impartial trial?

Perhaps it would be considered idle to speculate as to why these matters did not come distinctly to the attention of the jury, but it seems the plain fact that the case should be tried on its merits on the theory of absolute innocence under the counts of the indictment. As matters went, these two boys seemed to be, in some degree at least, the innocent victims.

VII.

We are mindful of the position of the case as affected by the finding of the jury, but we submit to this Court that, as the case seems not to have proceeded upon any theory of innocence, the jury never had opportunity for consideration of the points herein referred to, especially the items from "a to h," and while we do not disagree with the legal propositions laid down in the opinion by His Honor, Judge Neterer, District Judge, yet, the injustice which circumstances have surrounded this defendant is so appealing that it is believed, and we trust, that this Court will see that side of the case to be uppermost, so that a future trial will be upon all of the facts instead of limited mainly to Alexander Stumpf.

VIII.

The record, taken as a whole, justifies the construction and conclusion that Coates' connection with Stumpf was as a creditor consistently following from place to place the money he had unwittingly handed to Stumpf, and that the relation between them was that of debtor and creditor, and in that character alone he sought Stumpf out at different times and places, having the purpose and belief that the proposed business was the manufacture of grape concentrates.

IX.

The record, as a whole, justifies the view and conclusion that defendant did not have a fair and impartial trial, and we submit to the Court that when defendant had closed his case before the jury and requested of the Court peremptory instructions that they should find for the defendants, that such request or motion was in the nature of a demurrer to the case as presented, and, in the absence of testimony by the defendant, we beg that this Court will give due consideration to that feature and grant a rehearing and new trial to the end that all facts may be presented before the jury and justice done to these defendants.

That request to the court below for instructions to find for the defendants is the key, not only to defendant's confidence in the request in the nature of

demurrer, but his great confidence in his innocence appearing in the case from the evidence, and it is with confidence that we take the same attitude.

X.

During the trial and in the instructions to the jury, and also in the opinion filed by this Honorable Court, much was made over the memorandum on a yellow card containing items written by this appellant, giving costs of items of material purchased by Stumpf.

Regarding that, we respectfully submit to this Court that the proper and fair construction of the incident of that card was to establish by Coates the amount of money that was owed to him by Stumpf, and that card was used as an item of guilt as a conspirator, and we submit that when that piece of paper was given what seems a forced construction against the appellant, and given such prominence and importance in the case before the jury and in this Court, it was most damaging and prejudicial to the interests of appellant, and it seems to us should now in this Court entitle appellant to a new trial.

XI.

We respectfully submit to this Court the following rulings of the court below against appellant and over his objection and exception, all of which we contend are prejudicial to the interests and rights of defendant:

a The trial court admitted in evidence certain parts of alleged still which had been found hidden among some bushes, and went before the jury as equipment owned by all the alleged conspirators, when in point of fact they were, and had always been, the property of Alexander Stumpf, and the plant dismantled and any conspiracy ended. This matter was extremely prejudicial to the interests of appellant in that it suggested to the jury the idea of a still in operation controlled and owned by this defendant as a conspirator.

b The trial court admitted Alexander Stumpf to testify, under objection, regarding a conversation between himself and Malter regarding matters that occurred after the still had been dismantled and the conspiracy ended by Coates' interference. That assumption and statement of conspiracy in connection with the immediate offer of "Condenser" was of itself prejudicial to this defendant.

c The admission by the court of the yellow card, as exhibit #4, was extremely prejudicial to the interests of appellant.

d The court admitted evidence, exhibit #5, being a contract of purchase for the Foss ranch bearing the signatures of Foss and wife and Alexander Stumpf. This offer, admitted after Stumpf had shown himself a conspirator, and the man dealing with the ranch, was irrelevant and immaterial as tending only to indicate that Coates was con-

nected, as a party, in the purchase and ownership of that property, and he was therefore greatly prejudiced thereby.

e That the court permitted Stumpf to testify, against objection, conversations or statements of D. Arkalian, one of the defendants, regarding alleged transactions by him connected with narcotics, and that evidence was extremely prejudicial to this defendant. Objection overruled and exception taken.

f The court permitted a typewritten statement of certain conversations attacking Mr. Coates on some collateral ground, and defendant had no opportunity for cross-examination, which was necessarily prejudicial to appellant (Whitfield, page 141).

g W. G. Whitfield was permitted by the court, against objection, to testify about an alleged offer of Brix to plead guilty as a conspirator; not being made in the presence of defendant Coates, and made after conspiracy had fully terminated. We complain of being thereby prejudiced.

h The following ruling was made:

"The Court. Is this the result of a conversation that was told you?

A. Yes sir.

Q. By whom?

A. By Stumpf.

The Court. All right, overruled,"

to which exception was taken.

XII.

In the interest of this defendant, it is an important and rather remarkable feature to call to the Court's attention that the many offers and objections to testimony on the part of the Government there was favorable action of the Court, and all offers of testimony made by the defendant objected to by Government were sustained.

XIII.

While it is true, as pointed out by this Court, that defendant must be prepared to meet the facts set forth in the indictment and that the question of sufficiency of the indictment was not properly raised in the case, we submit and now beg that this Court will take that circumstance into consideration in determining the question of a new trial, when defendants themselves can be heard and all facts placed before the jury.

XIV.

The defense, having rested its case, and the matter of time for reargument having been settled, the Court made the following remarks, in the presence of the jury:

> "Gentlemen, I feel this way, that the facts of this case, or rather the questions that the case will determine or will turn upon, is quite clear, and if in fact I question whether the limit given is not an excessive limit in view of the entire complexion of the case; I don't think any injustice is being done to anybody by reason of the limit placed upon the time."

On application for time, the Court allowed forty minutes and then added:

"No, the case must go to the jury today.",

to which counsel for this defendant took an exception.

It may be observed in this connection that the trial court itself being apparently misled by that very unfortunate occurrence of two conspiracies in the record being construed and treated as admission of guilt on the part of this defendant, and presumably that conviction on part of the court below accounts for the sentence as it stands. May we say here that the jury was out approximately 24 hours.

XV.

Thereupon, the defendant Coates, through his counsel, then and there asked the court to instruct the jury to return a verdict of not guilty on the ground that the evidence was, and is, not sufficient to justify any other verdict than a verdict of not guilty on the first count, the second count, the third count and the fourth count of the indictment, which request was by the court denied and exception taken by defendant.

Very respectfully submitted,

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Attorneys for Appellant.